BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	
Opinion requested by Donald C. Green Law Offices of Green and Azevedo	No. 75-098 July 3, 1975

BY THE COMMISSION: We have been asked the following questions by Donald C. Green, Law Offices of Green and Azevedo:

(a) Does Government Code Section 86202[1/] prevent a lobbyist from advising his or her employer with regard to making political campaign contributions to state officials?

(b) Do Sections 86200, et seq., prohibit a lobbyist from advising his or her employer with regard to the voting record of a legislator?

CONCLUSION

(a) By advising his or her employer with regard to making political campaign contributions to state officials, the lobbyist has arranged for the making of a contribution as prohibited by Section 86202 if all of the following criteria are met:

(1) the lobbyist communicated with the employer;[2/]

(2) the advice was given wholly or partially with the intent of influencing the employer's decision to make a campaign contribution;

(3) the employer in fact made a contribution; and

(4) the lobbyist's advice was a causal element in the making of the contribution.

[1/] All statutory references are to the Government Code unless otherwise noted.

[2/] The test announced in this opinion does not apply to the communication of factual information readily available to members of the public. See discussion infra, pp.3-4.

(b) The dissemination of factual information concerning a public official's voting record does not fall within the prohibitions of Sections 86200, et seq.

ANALYSIS

By adopting the Political Reform Act of 1974 (hereinafter referred to as "the Act"), the people of California found that "... candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions." Section 81001(c). The Act seeks to eliminate such disproportionate influence by imposing certain restrictions on lobbyists, including a provision that prohibits lobbyists from making or arranging for the making of contributions to state officials and candidates. Section 86202 provides that:

> It shall be unlawful for a lobbyist to make a contribution, or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or by any other person.3/

In past years, lobbyists have customarily either made campaign contributions on behalf of their employers or participated in their employers' decisions concerning contributions. They have traditionally taken an active part in their employers' decisions concerning recipients, amounts and timing of political contributions. However, Section 86202 and other provisions of the Political Reform Act are premised on the idea that a lobbyist is an advocate and that persons who lobby should succeed or fail on the merits of the position and the persuasiveness of the arguments. (See California Labor Federation, 1 FPPC Ops. (June 18, 1975).) To eliminate the possibility of undue influence over public officials, the Act not only prohibits a lobbyist from making contributions and acting as an agent or intermediary in the making of a contribution, it also prohibits a lobbyist from arranging for the making of a contribution.

The meaning of the phrase "arrange for the making of any contribution" has been considered in another forum. In a memorandum opinion denying a preliminary injunction issued in the case of Institute of Governmental Advocates v. Younger, No. C 110052 (L.A. Superior Ct., Feb. 19, 1975), the court concluded that the word

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3/"Contribution" as used in this section refers only to contributions made to state officials and candidates and committees supporting such persons.

"arrange" as used in Section 86202 does not include a recommendation from the lobbyist to his client regarding a contribution. The opinion states that the prohibition against arranging for the making of a political contribution only prohibits a lobbyist from being a middleman or broker between the recipient and donor of the contribution.

After a careful reading of the statute and consideration of the statutory intent that underlies the Act, we conclude that "arrange" means more than act as a middleman. A lobbyist is expressly prohibited from acting as a middleman by a separate clause of Section 86202 which prohibits a lobbyist from acting as an agent or intermediary in the making of a contribution. It is fundamental to statutory construction that effect should be given to the statute as a whole, and to its every word and clause, so that no part or provision will be useless or meaningless. Weber v. Santa Barbara County, 15 Cal.2d 82, 86 (1940). "Arrange" then must have a different meaning than acting as an intermediary. If the meaning were the same, the provision would be redundant and useless.

Furthermore, as described above, Section 86202 was enacted to eliminate any possibility that lobbyists could exercise undue influence over public officials. The section seeks to sever the link between lobbying and making contributions. To accomplish this purpose, the word "arrange" must be interpreted to restrict lobbyist participation in decisions to make contributions regardless of whether or not the lobbyist has direct contact with the recipient of the contribution.

Having determined that the word "arrange" as used in Section 86202 includes a broader range of conduct than merely acting as a middleman or intermediary, we must determine whether a lobbyist who advises his employer is "arranging" for the making of a contribution. "Advise" means to give an opinion or counsel or recommend a plan or course of action. McGraw v. Marion County Plan Commissioner, 174 N.E.2d 757, 760 (1961). Advise can also mean to give notification or notice to, to apprise, to inform. Hunter v. Adams, 180 C.A.2d 511, 518 (1960).

The prohibitions contained in Section 86202 are not intended to prevent the free exchange of information between the lobbyist and his employer. A lobbyist who advises his or her employer by informing the employer of factual information which is readily available to members of the public is not arranging for the making of a contribution. Thus a lobbyist may communicate information to the employer concerning the voting and legislative record of a public official, may relate factual information concerning bills that affect the employer's interest and may describe positions taken by various officials on public issues. The transmittal of

such factual information is so clearly an integral part of the employment relationship that the lobbyist is not arranging for the making of a contribution when he relates such information.

Other communications between the lobbyist and his employer may be arranging for the making of a contribution depending on the purpose and effect of a communication. A lobbyist who advises his or her employer by making communications other than those described above has arranged for the making of a contribution if the following criteria are met:

(1) the lobbyist made a communication other than factual information as described above;

(2) the communication was given wholly or partially with the intent of influencing the employer's decision to make a campaign contribution;

(3) the employer in fact made a contribution; and

(4) the lobbyist's communication was a causal element in the making of the contribution.

The opinion request asks whether a lobbyist is prevented from advising his or her employer with regard to making political campaign contributions to state officials. Advising, in and of itself, does not constitute arranging for the making of a contribution. However, advising the employer by describing or recommending contributions to particular state candidates, officials or committees is arranging for the making of a contribution if the communication meets all of the tests described below.

1. Communication with Employer

Information must be transmitted from the lobbyist to his employer. The communication may be direct or through others. Ordinarily the communication will be oral or in writing, but nonverbal communication by which the lobbyist conveys his meaning will meet the test. For example, the communication test would be met if the employer furnishes the lobbyist with a list of candidates and the lobbyist checks off certain candidates. Similarly, a lobbyist who conveys an invitation to his employer for a political fundraising event is communicating with that employer.

2. Intent of the Communication

The communication must be made wholly or partially with the intent of influencing the employer's decision to make a campaign

contribution. Thus, the lobbyist must have the specific intent not only to communicate with the employer but also to influence the employer's contribution decision.

Whether advising was done wholly or partially with the intent of influencing the employer's decision to make a contribution will be determined from the total circumstances surrounding each situation, including the content of the communication, to whom it was submitted, the proximity of the date of communication to the time when decisions regarding contributions are made, and the reasons for the communication. To a certain extent, whether advising is done wholly or partially with the intent of influencing the employer is a subjective matter, but,

> The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as "reasonable," "prudent," "necessary and proper," "substantial" and the like.
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> County of Nevada v. MacMillen, 11 Cal.3d 662, 673 (emphasis in original).

We are confident that the lobbyist who communicates with his employer is cognizant of his motives for doing so and will be able to conform his conduct to the standards we set forth in this opinion.

3. Making of a Contribution

The employer must actually make a contribution to a state candidate, committee supporting a state candidate or an elected state officer.

4. Causation

The lobbyist's communication must be a cause of the employer's contribution. Like the purpose of the communication, causation will be determined from all the circumstances surrounding a contribution. Causation will exist when it is apparent, upon consideration of all surrounding circumstances, that there is a casual connection between the communication and the resulting contribution. The mere fact that the contribution occurred during the time that the lobbyist was retained by the employer is not sufficient to indicate the required causation. However, if the lobbyist actively participates in the employer's decisions to make contributions, the requisite causation may be inferred from surrounding circumstances.

Our interpretation of Section 86202 is fully consistent with First Amendment guarantees of freedom of speech and association.

It is well recognized that lobbyists can be subject to certain restrictions and disclosure requirements because of their unique opportunities to influence the legislative process. The United States Supreme Court has upheld the Federal Regulation of Lobbyist Act, 2 U.S.C. Sections 261-270 (1946). Dismissing allegations that the federal act interfered with First Amendment rights, the court observed that:

> ... (F)ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate ... pressures (to which they are subjected). Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.
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> United States v. Harriss, 347 U.S. 612, 625 (1953)

California's Political Reform Act imposes stronger restrictions on lobbyists' conduct than those which were upheld in Harriss. However, restrictions on political activity, including limitations on campaign contributions, have been upheld when applied to other groups of persons. (See Ex Parte Curtis, 106 U.S. 371 (1882).) The Hatch Act prohibits federal employees from taking an active part in political campaigns (5 U.S.C. Section 7324(a)(2)), and has been upheld against repeated attacks. Courts have observed that limitation of First Amendment rights is permissible because it is essential to the national interest that federal service depend on meritorious performance rather than political influence. United Public Workers v. Mitchell, 330 U.S. 75 (1947), Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973). Under the Hatch Act, federal employees are not allowed to solicit, receive, collect, handle or disburse assessments, contributions, or other funds. 5 C.F.R. Section 733.122 (1975). The Supreme Court has also upheld a state statute, similar to the Hatch Act, under which state employees were not allowed to solicit, receive, or in any manner be concerned with soliciting or receiving any political contributions. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

The Hatch Act applies to many federal employees who have no involvement with the political process. For example, in United Public Workers v. Mitchell, supra, the Hatch Act was held to prohibit the political activities of an industrial worker in a United States mint. The court refused to draw a distinction between administrative and industrial workers. In contrast, the restrictions against lobbyist contributions with which we are concerned

are drawn to include a small group of people who play a highly sensitive and influential role in the governmental process.

In Institute of Governmental Advocates v. Younger, No. C 110052 (L.A. Superior Ct., Feb. 19, 1975), the court stated that if the word "arrange" in Section 86202 were to include recommendations made by a lobbyist to his client, such a reading would probably be an invalid invasion of First Amendment rights, citing NAACP v. Button, 371 U.S. 415 (1963) and Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964). As described earlier, we believe that the word "arrange" must be read to include activities such as recommendations to the employer with regard to political campaign contributions in order to fulfill the statutory purposes of the Act. We also believe that the cases cited in support of the court's ruling are not applicable to the instant case.

In NAACP v. Button, supra, the Supreme Court held that a state statute prohibiting solicitation of legal business infringed on the rights of members of the NAACP to associate for the purpose of assisting certain persons. Brotherhood of Railroad Trainmen v. Virginia, supra, involved a fraternal association, in contrast to the lobbyist and his or her employer. The Brotherhood advised injured members to obtain legal advice before settling their claims against the railroad and recommended particular attorneys to handle the claims. The Supreme Court reversed a conviction of solicitation of legal business under a state statute, holding that First Amendment guarantees of free speech, petition and assembly give the railroad workers the right to gather together to help and advise one another. Both cases involved factual situations where the plaintiff organizations assisted persons who might otherwise be deprived of their rights. In Button, the NAACP was concerned with using the courts to guarantee civil rights to blacks. In Railroad Trainmen, the Brotherhood sought to inform its members of statutory rights to compensation for injuries. Both groups were seeking to effectuate a basic public interest, for, as the Court observed, "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." Brotherhood of Railroad Trainmen v. Virginia, supra, at 7. In both cases, the state was unable to demonstrate a state interest which would justify the restrictions it sought to impose. In the present situation, the statute is directed at restoring and preserving the proper functioning of government by preventing lobbyists from exercising undue influence over the legislative process. The state has demonstrated an interest which supports the statute.

Although we have given great weight to the views of the Superior Court in Institute of Governmental Advocates v. Younger, supra, we respectfully decline to follow that opinion.[5/] In this

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[5/] This Commission is not bound by the trial court decision. See 6 WITKIN, California Civil Procedure, Section 659 at 4574 (2d Ed. 1971).

opinion we have construed the phrase "arrange for the making of any contribution" to include "advising an employer with regard to making political campaign contributions" if the advice communicated to the employer is not factual information readily available to members of the public, the communication is given wholly or partially with the intent of influencing the employer's decision to make a political contribution and the contribution is a causal element of a contribution actually made.

Mr. Green also asks whether Sections 86200, et seq., prohibit a lobbyist from advising his or her employer with regard to the voting record of a legislator. Informing an employer of a public official's voting record is a general dissemination of factual material which is readily available to members of the public and therefore, for the reasons stated above, is not prohibited by the Act.

Approved by the Commission on July 3, 1975. Concurring: Brosnahan, Lowenstein and Miller. Dissenting: Carpenter and Waters.

Daniel H. Lowenstein
Chairman

CARPENTER, COMMISSIONER, DISSENTING IN PART: I dissent only from that part of the majority opinion which would limit a lobbyist in communicating with his employer or client about the legislative record of a legislator to "factual information which is readily available to members of the public." No array of authority is required to demonstrate that such a conclusion violates fundamental state and federal constitutional rights of speech and assembly and the right to instruct representatives and petition the government for redress in grievances. A lobbyist need not be employed to obtain factual information readily available to members of the public. A subscription to a computerized print-out is all that would be required.

Section 86202 provides that:

> It shall be unlawful for a lobbyist to make a contribution, or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or by any other person.

A lobbyist is not "arranging" a contribution to a state candidate, legislator or other elected state officer unless there is some "agreement" with respect to the possibility of such a contribution or there is a continuing record of effective recommendations by a lobbyist to his employer or client to make contributions and all of the four criteria of the majority opinion are met.

Whether a legislator or state candidate merits the support of an employer or client of a lobbyist will depend upon many factors including, in part, the public voting record of a legislator. It will also include unrecorded votes in caucuses, failure to vote, failure to reply to a roll call vote when present, urging colleagues to vote against a measure the legislator votes in favor of, voting against a bill for constituent purposes with knowledge that there will be sufficient affirmative votes to carry the bill the legislator actually favors and other legislative activity or inactivity on subjects of vital concern to an employer or client of the lobbyist. Only those who attend all formal or informal sessions and gatherings of legislators, committees, subcommittees or caucuses and who are in daily communication with legislators and committees and their staffs will be in a position to give an accurate record of a legislator to an employer or client. Most of the latter information cannot be obtained by merely resorting to information readily available to members of the public.

The Political Reform Act recognizes that lobbyists perform an essential and constitutionally protected function. They represent school teachers, the League of Women Voters, environmentalists, counties, cities, universities, taxpayers and every conceivable type of business, industry and profession whose interests are and can be affected whenever the Legislature is in session. As the majority opinion states:

> We are confident that the lobbyist who communicates with his employer is cognizant of his motives for doing so and will be able to conform his conduct to the standards we set forth in this opinion."

I agree. I am also of the opinion that the lobbyist has the constitutionally protected right and responsibility to transmit, and the employer or client has the same constitutionally protected right to receive, all available information from whatever source that will enable the employer or client to determine whether and to what extent the legislator or state candidate merits the support or opposition of the employer or client. So construed, Section 86202 does not inhibit fundamental constitutional freedoms.

WATERS, COMMISSIONER, joins in this separate opinion.